92-1087

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

DARLENE PERELLA, on her own behalf and all others similarly situated,

Petitioner,

v.

COLONIAL TRANSIT, INC. a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statute of limitations is legally or equitably tolled, as of the date of filing of a complaint under section 216(b) of the Fair Labor Standards Act, with respect to potential class action members, during the period in which the district court addresses issues relating to discovery of, and notice to, potential class action members and disposes of the Defendants' motion for summary judgment.

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DARLENE PERELLA, on her own behalf and all others similarly situated,

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COLONIAL TRANSIT, INC. a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Darlene Perella, on her own behalf and on behalf of all others similarly situated, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on September 30, 1992.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reprinted in the appendix, *infra*, at 1a. The opinion of

the district court is unreported and is reprinted in the appendix, *infra*, at 3a.

JURISDICTION

Petitioner filed a civil action to recover for non-payment of overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* on behalf of herself and all others similarly situated. The district court entered an order on July 19, 1991, which held that the statute of limitations had expired, as a matter of law, with respect to the claims of potential class action members during the pendency of the case. On September 30, 1992, the court of appeals entered its judgment affirming the district court's order.

The jurisdiction of this Court to review the judgment order of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 216(b) (1982 ed.), reprinted in full in the Appendix, *infra*, at 12a-13a.

29 U.S.C. § 256, reprinted in full in the Appendix, *infra*, at 13a.

STATEMENT OF THE CASE

On March 31, 1989, Darlene Perella filed a Complaint in the U.S. District Court for the Western District of

Pennsylvania, seeking to recover, on behalf of herself and other employees of Colonial Transit, Inc., unpaid overtime compensation, liquidated damages, attorney's fees and costs under the provisions of section 16(b) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 216(b) (the "FLSA").

The employees involved are engaged in the business of transporting elderly and handicapped persons through a government sponsored program known as "Access." Colonial voluntarily began to pay these employees overtime in November of 1988. Therefore, based upon a two year statute of limitations, Perella was seeking damages for the period of April 1, 1987 through October, 1988.

In the Complaint, Perella averred that she was a proper party to sue on behalf of the unnamed and unknown class as well as all other averments as mandated by Rule 23 of the Federal Rules of Civil Procedure. Perella sought the intervention and assistance of the district court, through the Rule 23 class action procedures and through discovery, in identifying and notifying potential class members.

On June 13, 1989, Defendants filed a motion for summary judgment. In support of its motion, Defendants argued that it was exempt from overtime provisions of the FLSA by virtue of Section 13(b)(17) of the Act, which exempts employers of taxicab drivers from paying overtime.

On October 23, 1989, after being rescheduled twice, a status conference was held by the district court. At this

conference, in addition to discussions concerning Defendants' motion for summary judgment, the court discussed procedures for determining the potential class as well as other aspects of the maintenance of the Complaint as a class action. Following this status conference, the district court entered an order on October 24, 1989, concerning the procedure for discovery, response and argument on Defendants' motion for summary judgment. Discovery, by this order, was specifically limited to issues relating to the motion for summary judgment. Counsel for the Plaintiff suggested that the court proceed with class certification at this early date. His request, however, was deferred for reason of judicial economy pending the resolution of the Defendants' summary judgment motion. Counsel for Defendants specifically argued that the court should not proceed with consideration of the class action issues, contending that " . . . if there is no action, it doesn't make sense to deal with the class action issue." The district court specifically stated that it would defer proceedings relating to the notification of potential class action members until the court disposed of Defendants' motion for summary judgment.

On April 20, 1990, after argument, the district court denied Defendants' motion for summary judgment. The district court's order directed the Plaintiff to proceed with the class action certification process.

On May 9, 1990, Plaintiff filed and served a Motion for Certification of Class Action and her second set of interrogatories to Defendants. These interrogatories sought to discover information exclusively in the control of the Defendants such as the identity of potential class members and amount of potential damages.

A status conference was held on June 5, 1990. At this status conference, counsel for the Defendants orally suggested to the court that the certification of members of the class should proceed pursuant to Section 216(b) of the FLSA, rather than pursuant to rule 23 of the Federal Rules of Civil Procedure. Defendants' counsel stated that, under Section 216(b) of the Act, class members must opt-in to a class as opposed to the procedure under the Federal Rule of Civil Procedure, Rule 23, class action where members are automatically included unless they affirmatively opt-out of the class.

Defendants' counsel stated, "I believe that there are similar essentially class action provisions under the Fair Labor Standards Act." The Defendants never raised any issues relating to a bar of the claims of the potential class action members by reason of the statute of limitations. The district court responded to this argument by stating that Plaintiff must discover the persons within the potential class regardless of opt-in or opt-out requirements. The court determined that, until the information was procured by the Plaintiff, *any* consideration concerning the maintenance of the class action should be deferred; including whether a potential claimant should opt-in or opt-out.

Although Defendants' response to Plaintiff's Second Set of Interrogatories was due on June 8, 1990, this deadline was extended based on Defendants' request for additional time. The court decided that each potential plaintiff should be notified of the lawsuit *and* the amount of his or her potential claim. Accordingly, the court set a discovery deadline concerning the issues of class certification and ordered that the Defendants respond to interrogatories

concerning the identity of potential class action members and the amount of potential damages by September 28, 1990. The court's order also provided for a briefing schedule requiring Plaintiff's brief in support of her motion for class certification and supporting documentation filed not later than October 19, 1990. Defendants' brief in response to Plaintiff's motion was ordered filed not later than November 16, 1990.

On August 1, 1990, Defendants filed a limited response to Plaintiff's second set of interrogatories concerning the identity of potential class members and damages. This response was limited to the period beginning on March 1, 1987, in contrast to the Plaintiff's request for information beginning on April 1, 1986. On September 19, 1990, Defendants filed supplemental answers to the interrogatories. These answers provided information from April 1, 1986.

In late September, 1990, counsel for the parties conducted a telephone conversation concerning this litigation and the possibility of a settlement. During this telephone conversation, counsel for the Defendants, for the first time, advised Plaintiff of Defendants' position that the applicable statute of limitations was not tolled with respect to potential class action members who had not affirmatively opted into the action.

As a result of this telephone conversation, counsel for the Plaintiff requested a status conference concerning the issue of the statute of limitations. The status conference was held on October 26, 1990.

On July 17, 1991, the district court entered an order that the action could proceed as an individual action only.

The district court ruled that the claims of potential class action members were, as a matter of law, barred by the two year statute of limitations as a result of the lapse of time during the pendency of the action before the court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE UNCERTAINTY SURROUNDING WHETHER THE FAIR LABOR STANDARDS ACT STATUE OF LIMITATIONS MAY BE TOLLED UNTIL POTENTIAL CLASS ACTION MEMBERS HAVE HAD THE OPPORTUNITY TO FILE A CONSENT.

The district court and the court of appeals rejected Petitioner's argument that the statute of limitations under the FLSA could be tolled under the facts before this Court. Accordingly, the district court found that the plaintiff and all others similarly situated as class members are barred, as a matter of law, from pursuing a FLSA section 216(b) class action.

This decision is disruptive for several reasons. First, the district court's opinion rejects any consideration of the alternative of tolling the statute of limitations under the FLSA. The FLSA is silent on the issue of whether such tolling is permissible. Several courts have, however, addressed the question of tolling the FLSA statute.[1] *Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757,

[1] *See*, for example, *Hodgson v. Humphries*, 454 F.2d 1279, 1284 (10th Cir. 1972). The court concluded that the express purpose of the limitations period was to substitute a uniform federal limitations period for the diverse periods provided

760 (9th Cir. 1981) established the doctrine of equitable tolling of the FLSA statute of limitations, concluding that the doctrine had substantial policy justifications.[2] The court pointed out that statutes of limitation are designed to ensure fairness to defendants and to notify them of claims they must defend before the claim grows stale. In *Partlow*, the employer was placed on notice of the claims of consenting employees by the filing of defective consents. The court concluded that to require the employer to defend the claims would not result in substantial hardship to the employer.

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under various state statutes. *See* Section 1 of the Portal-to-Portal Act, 29 U.S.C. § 251. The court felt that the statute of limitations requirement was intended by Congress as a limitation on the remedy available, not on the right to bring the action; *Ott v. Midland Ross*, 523 F.2d 1367, 1370 (6th Cir. 1975), an ADEA action wherein the court read Section 225 as procedural and explained that "It is not like a statute which imposes a liability and provides the remedy which must be exercised in strict conformity to the statute." Accordingly, the court indicated that the limitation could be avoided if *equity warrants* (emphasis added).

[2] In *Partlow*, Plaintiffs filed an action alleging that the defendant, Vista, had violated the FLSA by failing to pay adequate overtime compensation to its employees. The lawsuit proceeded as a class action under 29 U.S.C. § 216(b). Counsel for plaintiffs, without leave of court, sent letters to current and former employees of Vista soliciting their consent to become parties to the action. The Ninth Circuit concluded that, while it was improper for plaintiffs' counsel to solicit potential plaintiffs, once the potential plaintiffs received notice, albeit defective, and decided to join the suit, to fail to toll the statute of limitations and to forever bar claims of potential plaintiffs might have, would be improper.

In *Donovan v. Crisostomo*, 689 F.2d 869, 875 (9th Cir. 1987) the court remanded on the question of whether the district court should provide the Secretary of Labor an opportunity to justify the application of the doctrine of equitable tolling established in *Partlow*. Under the facts in *Donovan*, the Secretary of Labor failed to name certain claimants in the original complaint in a FLSA action. The statute of limitations became an issue with respect to damages for such employees. The defendant did not raise the issue at trial, but instead, sought to raise it before the Ninth Circuit. The Secretary of Labor contended that, if the matter had been raised at trial, and had he known it was an issue, he would have explained his failure to include those employees. The court remanded concluding that the Secretary could reasonably have been misled by the defendant's failure to raise the issue at trial. The court noted that some consideration by the district court of the applicability of the doctrine of equitable tolling would be appropriate upon remand.

The same justifications are present in the instant case. The district court proceeded from March of 1989, when the Complaint was filed, to late September of 1990 under the assumption that no statute of limitations issue existed. Clearly, the district court would have proceeded to address issues relating to notice to potential class members at the initial status conference, in October of 1989, had the court been aware of the practical effect of its decision to proceed with the disposition of defendants' motion for summary judgment and other discovery-related issues. This conclusion is inescapable in light of counsel for the Plaintiff's continuous concern with

addressing class action issues throughout the status conferences.[3]

In considering the congressional intent of the FLSA, this Court, in *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 173, 110 S.Ct. 483, 488, 107 L.Ed.2d 480 (1989) noted that the broad remedial nature of the statute should be enforced to the full extent of its terms. Moreover, courts have concluded that equitable tolling is read into every federal statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 421 (1946).[4]

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[3] In the initial status conference in October of 1989, counsel for the Plaintiff raised the issue of proceeding with notice to potential class members. The district court made a specific decision to defer any decisions regarding proceeding with notice to potential class members pending discovery on and disposition of the defendants' motion for summary judgment. 27a. In the second status conference held on April 20, 1990, the court denied Defendants' motion for summary judgment. Again, counsel for the Plaintiff requested that the district court to address the issue of proceeding with notice to potential class members. 45a-46a. At the third status conference, held on June 5, 1990, the district court postponed the issue of certification of the class in order to allow for discovery on issues related to the identity of the class *and the amount of each potential claim*. The court's briefing schedule extended to November 16, 1990 and ordered a status conference for December 12, 1990. Clearly, the court would not have structured the order to extend into December of 1990 if the Court had contemplated an expiration of the statute of limitations. 47a-54a, 14a-15a.

[4] "[I]t is the established rule that exceptions to a statute of limitations will not be implied,. . . . Nevertheless, most courts recognize a limited class of exceptions,. . . . In such instances of necessity, the running of the statute of limitations may be suspended even though no exceptions or causes of suspension are mentioned in the statute itself." *Fulton v. NCR Corp.*, 472 F.Supp.

> [T]he basic question to be answered in determining whether . . . a statute of limitations is to be tolled, is one "of legislative intent whether the right shall be enforceable . . . after the prescribed time." *Burnett v. New York Central R. Co.*, 380 U.S. 424, 426, 85 S.Ct. 1050, 1053, 13 L.Ed.2d 941 (1965) (quoting *MidState Horticultural Co. v. Pennsylvania Railroad*, 320 U.S. 356, 360, 64 S.Ct. 128, 130, 88 L.Ed. 96 (1943)).

As this Court notes in *Burnett*, the basic inquiry is whether the congressional intent set forth in the statute is one which is effectuated by tolling the statute of limitations under a given set of circumstances. *Id.*, at 427. Petitioner has reviewed the purpose, policies and the remedial nature of the FLSA's provisions. Petitioner has also reviewed statements of counsel for the parties and the court. In light of the manner in which this case proceeded from the time of the filing of the Complaint in March of 1989, Petitioner contends that the congressional intent of the FLSA would be completely defeated by an inflexible interpretation of the FLSA's limitation provision as being immune to the application of the doctrine of equitable tolling in the instant case. To deny potential plaintiffs an opportunity to proceed as a class under circumstances where the defendant was aware of the necessity of defending the claim, and where such defense does not visit upon the defendant substantial hardship, is fundamentally unfair and defeats the basic purpose of the FLSA. In the instant case, the defendants were, at all times, aware of the existence of the claims. In point of

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377, 383-84 (W.D.Va. 1979) (quoting 51 Am.Jur.2d, Limitation of Actions § 139, p. 710 (1970)).

fact, the defendants had sole and exclusive control of all information relating to the identity of the potential plaintiffs and the extent of those potential claims. Because of the ethical constraints facing counsel for the Plaintiff, as outlined in *Hoffmann-LaRoche,* the Plaintiff would have been unable to effectuate notice other than via a court-authorized notice. 493 U.S., at 171, 110 S.Ct. 482, 487.

The FLSA authorizes representative actions "in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1982 ed.) Congress has provided the opportunity for potential plaintiffs to proceed collectively. As this Court notes in *Hoffmann-LaRoche,* with respect to an ADEA action incorporated into the FLSA through Section 16(b):

> A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by pooling of resources. 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989).

This Court further notes that the judicial system benefits by the resolution of common issues in one proceeding.

A class action under the FLSA differs from the procedures under Rule 23 of the Federal Rules of Civil Procedure. Under the FLSA, a member of the class, who is not individually named and does not consent is not bound by an adverse judgment. Accordingly, that individual is not barred from the filing of an individual claim. *Kinney Shoe Corp. v. Vorhes,* 564 F.2d 859, 862 (9th Cir. 1977). Petitioner is aware that individual actions are available to those who would have been members of the class. However, the unfortunate effect of the district

court's opinion, in the instant case, is to preclude the potential plaintiffs from a practical opportunity for recovery given the small dollar amount of the average claim and the prohibitive cost of pursuing an individual action.[5]

This case presents a predicate for clarification of whether and under which type of circumstances, courts can toll the statute of limitations in a FLSA action. Resolution of the question presented would narrow the range of ligitable issues and ensure uniformity and consistency of adjudication. Petitioner therefore respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

II. THERE IS A NEED FOR GUIDANCE FROM THIS COURT ON THE IMPORTANT QUESTION OF THE SCOPE OF A DISTRICT COURT'S MANAGERIAL RESPONSIBILITY TO OVERSEE A FAIR LABOR STANDARDS ACT SECTION 216(b) CLASS ACTION AND TO ENTER APPROPRIATE ORDERS GOVERNING THE CONDUCT OF COUNSEL AND THE PARTIES.

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 101 S.Ct. 2193, 2200, 68 L.Ed.2d 693 (1981), this Court determined that " . . . a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties." *Hoffmann-LaRoche* mandated that section 216(b) of the FLSA's affirmative authority for

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[5] The average claim for unpaid overtime ranges from approximately $500-$1500 with many claims less than $500.

employees to proceed as a class necessarily grant[s] the Court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to the statutory commands or the provisions of the Federal Rules of Civil Procedure. 493 U.S., at 170.[6]

Typically, courts have managed the contours FLSA actions through procedures set forth in the Federal Rules of Civil Procedure for Rule 23 class actions. This is necessitated by the lack of procedural guidance for processing class actions under section 216(b) of the FLSA. In the instant case, the district court recognized and, in fact, exercised its responsibility for the management of the case. The court exercised its discretion, from the outset, by deciding the threshold issue of the defendants' motion for summary judgment and later, by controlling the manner by which the plaintiff would begin to collect the voluminous information necessary for eventual certification of the class. 16a-24a.

The district court proceeded completely without any concern whatsoever regarding a potential expiration of the statute of limitations. In fact, in the June 5, 1990 status conference, the district court rejected counsel for the plaintiff's suggestion that class members be given notice.

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[6] Specifically, *Hoffmann-LaRoche* held that district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.) in ADEA actions by facilitating notice to potential plaintiffs. 493 U.S., at 169. The provision in the ADEA requiring class members to file written consents arises out of section 216(b) of the FLSA.

To the contrary, the district court indicated that the identity of the potential plaintiffs *and* the amount of the claim for each should first be determined so that each potential plaintiff would know whether to participate in the suit. 47a-54a. Accordingly, the court entered its order of June 5, 1990 outlining a briefing schedule on the issue of certification and ordered a status conference for December 12, 1990, approximately one month after the statute of limitations would have expired. 14a-15a.

The district court determined that, as a matter of law, the statute of limitations had expired. 6a. Petitioner contends that this Court's decision in *Hoffmann-LaRoche* authorized the district court to enter an appropriate order establishing cut-off dates for joinder of additional plaintiffs. To allow the exact careful case management encouraged by *Hoffmann-LaRoche* to result in the injustice of barring potential plaintiffs, as would be the result in this case, is fundamentally unfair.

Hoffmann-LaRoche extended the district court's discretion to facilitate notice to potential plaintiffs in order to protect the opportunity of potential plaintiffs to proceed collectively. To allow the district court's attempts to facilitate the eventual joinder of additional plaintiffs to have the effect of barring those very plaintiffs this Court seeks to protect in *Hoffmann-LaRoche* is contrary to this Court's prior decisions and the legislative intent of the FLSA.[7]

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[7] The concept of " 'due process is flexible and calls for such procedural protections as the particular situation demands.' " *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)); the FLSA should be read

If the Court were to address the question of the scope of the district court's managerial responsibility over section 216(b) actions, it would serve to solidify the protections of the FLSA with respect to collective actions and would clarify the scope of *Hoffmann-LaRoche* with respect to issues other than, but equally as important as, notice to potential plaintiffs in a section 216(b) action. Accordingly, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

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broadly in favor of coverage. It has "been construed liberally to apply to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211, 79 S.Ct. 260, 264, 3 L.Ed.2d 243 (1959). A generous reading, in benefit from the law, is also appropriate when considering issues of time limits and deadlines. *Kelley v. Alamo*, 964 F.2d 747 (8th Cir. 1992). *Partlow v. Jewish Orphans' Home of Southern Cal., Inc.* held that due process considerations required the district court to provide notice to opt-in "class plaintiffs" who had previously filed ineffective consents to ensure that such claims would not be barred by the statute of limitations. 645 F.2d 757, 759-60 (9th Cir. 1981).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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behalf and all others
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No. ___

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OCTOBER TERM, 1992

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Petitioner

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Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

Filed September 30, 1992
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3054

DARLENE PERELLA, on her own behalf and all others similarly situated,

v.

COLONIAL TRANSIT, INC. a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC.,

DARLENE PERELLA, on behalf of all others similarly situated,

Appellant

Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civ. No. 89-0669)
District Judge: Honorable William L. Standish

Submitted under Third Circuit Rule 12(6)
September 24, 1992
Before: MANSMANN, ROTH and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Los Mansmann
Circuit Judge

Attest:

Sally Mrvos
Sally Mrvos, Clerk

September 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARLENE PERELLA, on her own behalf and all others similarly situated,	)	
Plaintiff,	)	Civil Action No. 89-669
vs.	)	
COLONIAL TRANSIT, INC. a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC.,	)	
Defendants.	)	

MEMORANDUM

In this civil action to recover for non-payment of overtime wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq.*, plaintiff, Darlene Perella, seeks to represent herself and all others similarly situated pursuant to 29 U.S.C. § 216(b). Section 216(b) provides, in part, that

> No employee shall be a party plaintiff to any [ ] [collective] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

In order to commence properly a class action brought under the FLSA, each purported class member must file a complaint and a written consent within the time allotted by the statute of limitations. This is in direct contrast to Rule 23 of the Federal Rules of Civil Procedure, pursuant to which the mere filing of a complaint on behalf of all

others similarly situated tolls the statute of limitations. Stated simply, the FLSA requires class members to opt-in to a class action while Rule 23 includes everyone until they affirmatively opt-out.

Defendants have asserted that because plaintiff's action arises under the FLSA and purported class members have not timely opted-in, the collective action is barred by the applicable statute of limitations. Presently before the court for consideration is the motion of plaintiff to proceed with her claim as a Rule 23 class action or, in the alternative, to amend her complaint to join additional named plaintiffs. For the reasons set forth below, the court concludes that the motions of plaintiff should be denied and the above-captioned civil action deemed an individual action by plaintiff Darlene Perella against defendants. The class action allegations of her complaint will be dismissed.

Statute of Limitations

Both parties have stipulated that the instant action accrued in mid-November of 1988, when the employees received pay checks for the last period for which they allegedly were denied overtime wages.[1] A two-year statute of limitations applies to plaintiff's claim, Title 29, United States Code, Section 255(a) specifically provides that an action under the FLSA "shall be forever barred unless commenced within two years after the cause of

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[1] Defendant Mayflower began paying overtime to its employees when it assumed control of the operations of defendant Colonial, on or about November 5, 1988.

action accrued."[2] Thus, the time in which to commence this lawsuit was mid-November of 1990.

Section 256 provides further clarification concerning the timeliness of the commencement of a class action brought under § 216(b).

> **§ 256. Determination of commencement of future actions**
>
> In determining when an action is commenced for purposes of section 255 of this title, . . . [a collective or class action] shall be considered to be commenced in the case of any individual claimant –
>
> > (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
> >
> > (b) if such written consent was not so filed or if his name did not so appear – on the subsequent date on which such written consent is filed in the court in which the action was commenced.

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[2] The court notes that § 255(a) further provides that a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). Plaintiff does not allege that defendants acted willfully to violate the FLSA. Nor has she ever argued that the three-year statute of limitations applies. Moreover, the fact that the statute of limitations has run on this action has been discussed at conferences involving counsel for both parties and the court and, indeed, is the very subject matter of the instant motion.

The statutory language makes clear that the filing of the consent may come after the filing of the complaint, but that a claim is not asserted, for purposes of the statute of limitations, until both the complaint and the claimant's individual written consent are filed. *See Kuhn v. Philadelphia Elec. Co.*, 487 F.Supp. 974, 975 (E.D.Pa. 1980) (citing *Groshek v. Babcock and Wilcox Tubular Products Div.*, 425 F.Supp. 232 (E.D.Wis. 1977) and *Kulik v. Superior Pipe Specialties Co.*, 203 F.Supp. 938 (N.D.Ill. 1962)), *aff'd*, 745 F.2d 47 (3d Cir. 1984).

Plaintiff timely filed her complaint on March 31, 1989. It is undisputed, however, that no written consent to become a party to the lawsuit has been filed by any plaintiff, named or unnamed. Neither party disputes the fact that the time in which to file the consent forms, and thereby commence the action, lapsed prior to the filing of the instant motion. The court concludes that the time in which to commence this FLSA claim on behalf of any class member has expired, and that plaintiff, and all others similarly situated as class members, are barred from pursuing an FLSA class action.

Rule 23

Plaintiff has requested the court to permit her cause of action to proceed as a class action under Fed.R.Civ.P. 23. The reason is clear. By way of this alternate route the action would not be time barred because the mere filing of the complaint would have tolled the statute of limitations. In an effort to convince the court that such action would be proper, plaintiff relies on a recent case form the United States Supreme Court, *Hoffmann-La Roche, Inc. v.*

Sperling, 493 U.S. 165, 110 S.Ct. 482, 107, L.Ed.2d 480 (1989). After carefully reviewing that case, it is clear that plaintiff's reliance is misplaced because *Sperling* is inapposite to the issue presently before the court.

The Supreme Court itself identified and articulated the precise issue presented by *Sperling*:

> As it comes before us, this case presents the narrow question of whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought.

Sperling, 493 U.S. at ___, 110 S.Ct. at 486, 107 L.Ed.2d at 488.[3] The court then went on to hold that

> district courts have discretion, in appropriate cases, to implement 29 U.S.C. §216(b) (1982 ed.), as incorporated by 29 U.S.C. §626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs. The facts and circumstances of this case illustrate the propriety, if not the necessity, for court intervention in the *notice process*.

Id. (emphasis added).

Plaintiff cites to several portions of the Supreme Court decision. To the extent that plaintiff argues it is proper for a district court to exercise managerial control over a class action, she is correct that *Sperling* supports

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[3] The fact that the *Sperling* action was brought under the ADEA, and not the FLSA, does not affect plaintiff's reliance because the provision in the ADEA, requiring class members to file written consents, comes from § 216(b) of the FLSA.

her position. However, the case does not suggest that such court management affects, in any way, the application of the limitation provision of Section 255(a) or the opt-in requirements of Section 256.

Plaintiff has not offered, nor has the court found, any authority to support the notion that an action to recover overtime wages pursuant to the FLSA may proceed under Rule 23. Quite to the contrary, case law supports defendant's position that Rule 23 class actions and § 216(b) collective actions are separate and distinct, and cannot be used in conjunction with one another.[4] Accordingly, plaintiff's motion to proceed under Fed.R.Civ.P. 23 must be denied.

However, the court concludes that Ms. Perella can proceed with her claim as an individual action because it

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[4] *See, e.g., Schmidt Fuller v. Brush Co.*, 527 F.2d 532 (8th Cir. 1975) (circuit court, adopting views of fifth circuit "relating to irreconcilability of § 16(b) of the Fair Labor Standards Act and Fed.R.Civ.P. 23", issued writ of mandamus directing district court to vacate order certifying FLSA action as a Rule 23 class action); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) ("Rule 23 cannot be invoked to circumvent the consent requirement of . . . FLSA § 16(b)"); *Groshek v. Babcock and Wilcox Tubular Products Div.*, 425 F.Supp. 232, 234 (E.D.Wis. 1977) ("This court has no authority under the FLSA to adopt portions of Rule 23 procedures and apply them to an action brought under the [FLSA]"); *Jackson v. University of Pittsburgh*, 405 F.Supp. 607, 612 (W.D.Pa. 1975) ("Equal Pay Act's class action provisions [29 U.S.C. § 216(b)] are distinct and independent of those of Rule 23"); *Lombardi v. Altemose Constr. Company, Inc.*, 69 F.R.D. 410, 411 (E.D. Pa. 1975) ("Rule 23 class action devise may not be utilized in FLSA suits"). *See also Dolan v. Project Constr. Co.*, 725 F.2d 1263 (10th Cir. 1984) for general discussion of the difference between Rule 23 and § 216(b).

was timely commenced in accordance with § 256 which provides that an action "shall be considered to be commenced on the date when the complaint is filed." 29 U.S.C. § 256. The special provision pertaining to the filing of written consents applies only to collective actions. *See* discussion on page 3, *infra*. The above-captioned civil action, therefore, shall be deemed an individual action.

Rule 15(c)

As an alternative to proceeding under Fed.R.Civ.P. 23, plaintiff has moved, pursuant to Fed.R.Civ.P. 15(c), to amend her complaint to add plaintiffs not named in the original filing who are clearly time barred from bringing new actions on their own. Until plaintiff files a proposed amended complaint identifying the additional plaintiffs sought to be joined and a memorandum of law stating why the proposed amendment should relate back to the date of the original filing and would not be barred by the statute of limitations, the court cannot consider the merits of the motion. Accordingly, the court concludes that plaintiff's motion to amend her complaint will be denied without prejudice to plaintiff's right to so move again.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARLENE PERELLA, on her own behalf and all others similarly situated, Plaintiff, vs. COLONIAL TRANSIT, INC. a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC., Defendants.	)	Civil Action No. 89-669

Order

AND NOW, this 17th day of July, 1991, for the reasons stated in the foregoing memorandum it is hereby ORDERED as follows:

1. The motion of plaintiff Darleen Perella, on behalf of herself and all others similarly situated, to proceed with this collective action to recover overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, as a class action pursuant to Fed.R.Civ.P. 23 shall be, and hereby is, denied.

2. The above-captioned civil action shall be, and hereby is, deemed an individual action by plaintiff Darlene Perella against defendants Colonial Transit Inc., a/k/a Colonial Taxi Company, Inc. and Mayflower Contract Services, Inc.

3. The motion of plaintiff Darleen Perella to amend her complaint pursuant to Fed.R.Civ.P. 15(c) shall be, and hereby is, denied without prejudice.

/s/ William L. Standish
William L. Standish
United States
District Judge

cc: W. Timothy Barry, Esq.
Dattillo, Barry, Fasulo & Cambest
32nd Floor, Gulf Tower
707 Grant Street
Pittsburgh, PA 15219

Mark Shiffman, Esq.
200 First Avenue
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Pittsburgh, PA 15222

STATUTES INVOLVED

29 U.S.C. § 216(b)

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of Section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of Section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. *An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.* The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a

complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 U.S.C. § 256 Determination of Commencement of Future Actions

In determining when an action is commenced for purposes of section 255 of this title, . . . [a collective or class action] shall be considered to be commenced in the case of any individual claimant –

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear – on the subsequent date on which such written consent is filed in the court in which the action was commenced.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARLENE PERELLA, on her own behalf and all other similarly situated, Plaintiff, vs. COLONIAL TRANSIT, INC., a/k/a COLONIAL TAXI CO., INC., and MAYFLOWER CONTRACT SERVICES, INC., Defendants.	)	Civil Action No. 89-669

ORDER

AND NOW, this 5th day of June, 1990, upon consideration of the motion of plaintiff, Darlene Perella, on behalf of herself and all others similarly situated, for class certification pursuant to Fed.R.Civ.P. 23, it is hereby ORDERED as follows

1. Discovery on the issue of class certification shall be completed on or before September 28, 1990.

2. Plaintiff shall file a brief in support of her motion for class certification, together with affidavits and other supporting documentation as may be appropriate, on or before October 19, 1990.

3. Defendant shall file a brief in response to plaintiff's motion for class certification, together with affidavits and other supporting documentation as may be appropriate, on or before November 16, 1990.

4. A status conference shall be held at 4:45 p.m. on December 12, 1990, 9th Floor, U.S. Post Office and Courthouse, Pittsburgh, Pennsylvania.

5. A hearing on plaintiff's motion for class certification shall be set at such time as the court shall further direct.

/s/ William L. Standish
William L. Standish
United States
District Judge

cc: W. Timothy Barry, Esq.
Dattilo, Barry, Fasulo & Cambest
32nd Floor, Gulf Tower
707 Grant Street
Pittsburgh, PA 15219

Mark Shiffman, Esq.
200 First Avenue
Waterfront Building
Pittsburgh, PA 15222

PLAINTIFFS	DEFENDANTS
DARLENE PERELLA, on her own behalf and all other similarly situated	COLONIAL TRANSIT, INC., a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC.

CASE CLOSED

#2 29 USC § 216(b) Fair Labor Standards Act

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

ATTORNEYS

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT
Perella	Colonial Transit, Inc., et al

DOCKET NO. 89-669

PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
1989		CA 89-669 Perella vs. Colonial Transit
Mar 31	1	COMPLAINT W/JURY DEMAND and summons issued.
Apr 5	2	RETURN OF SERVICE on deft executed on 4-4-89 by personal service.
Apr 19	3	APPEARANCE by Mark Shifman, Esq. et al and Baskin, Flaherty, Elliot & Mannino on behalf of the defts.
Apr 19	4	STIPULATION that defts have until 5-15-89 to answer.
May 10	5	ANSWER and Affirmative Defenses by all defts.
May 10	6	NOTICE scheduling Status Conf for 7-12-89 at 4:30 p.m.
Jun 13	7	MOTION for Summary Judgment by defts.
Jun 27	8	NOTICE that the status conf is rescheduled from 7-12-89 to 8-21-89 at 4:30 p.m.
Aug 18	9	NOTICE that the Status Conf scheduled for 8-21-89 is rescheduled for 10-23-89 at 4:30 p.m.

Oct 27	10	STATUS Conf held 10-23-89 before Standish, J. (rep; Ted Thomas) (memo filed)
Oct 27	11	ORDER dated 10-24-89 that any cross motion for summary judgment contemplated by pltf shall be filed by 12-15-89; Parties to complete discovery by 1-31-90; The parties responses to defts' summary judgment motion, and any cross motion for summary judgment of pltf to be filed by 2-21-90; An Argument on the Cross motions for summary judgment to be held on 4-12-90 at 3:00 p.m.. EOD: 10-27-89 cm: all parties of record.(STANDISH, J.)
1990		
Jan 23	12	MOTION for Extension of Time to comply with 10-24-89 order, by pltf w/proposed order.
Jan 27	w/12	ORDER dated 1-26-90 that the Order of 10-24-89 is Amended as follows: parties to complete discovery by 2-28-90; The parties responses to defts' summary judgment motion, and any cross motion for summary judgment of pltf, shall be filed by 3-21-90; An Arguemnt on the motions and cross motions for summary judgment shall be held 4-20-90 at 11:15 a.m.. EOD: 1-29-90 cm: all parties of record.(STANDISH, J.)
Jan 31	13	WITHDRAWAL of appearance by Marvin A. Fein, Esq., Robert W. Kennedy, Jr., Esq. and Baskin Flaherty Elliott & Mannino, P.C. with proposed order.

Jan 31	14	ENTRY of appearance by Mark S. Shiffman, Esq. and Jackson Lewis Schnitzler & Krupman on behalf of deft. Mayflower Contract Services, Inc.
Feb 16	15	APPEARANCE by Mark S. Shiffman, Esq. of Jackson, Lewis, Schnitzler & Krupman on behalf of defts.
Feb 26	w/11	ORDER dated 2-28-90 that the appearnce of Marvin A. Fein, Esq. and Robert W. Kennedy, Esq. of Baskin, Flaherty, et al is hereby withdrawn. EOD: 2-26-90(STANDISH, J.)
Mar 21	16	RESPONSE to defts' motion for Summary Judgment, by pltf, w/proposed order.
Apr 20	17	HEARING memo on deft's motion for summary judgment held 4-20-90 before Standish, J. (rep; Ted Thomas)
Apr 20	18	ORDER dated 4-20-90 thatthe defts' motion for summary judgment is hereby denied. EOD: 4-22-90 cm: all parties of record.(STANDISH, J.)
Apr 26	19	ORDER dated 4-25-90 that pltf's pretrial statement is due 5-18-90; Deft's statement due by 6-1-90. EOD: 4-26-90 cm: all parties of record.(STANDISH, J.)
May 9	20	MOTION for Certification of Class Action, by pltf w/proposed order.
May 11	21	NOTICE scheduling Status Conf for 5-30-90 at 4:00 p.m..
May 15	22	NOTICE rescheduling status conf from 5-30-90 to 6-5-90 at 4:00 p.m.
May 15	23	MOTION to Vacate Order of 4-25-90, by pltf w/proposed order.

May 21	w/23	ORDER dated 5-18-90 that the Order of 4-25-90 concerning the the filing of pre-trial statements is hereby vacated. EOD: 5-21-90 cm: all parties of record.(STANDISH, J.)
June 6	24	STATUS CONFERENCE held 6/5/90 before Judge Standish (Rep.: Ted Thomas) indicating Discovery to close 9/28/90: Pltf. to answer interrogatories by 7/31/90; Pltf's Brief in support of Class Certification due 10/19/90; Deft's Brief in response due 11/16/90; Status Conference scheduled for 12/12/90 at 4:45 p.m..
June 6	25	ORDER dated 6/5/90 that Discovery closes 9/28/90; that Pltf's brief in support of class certification due 10/19/90; Deft's Brief in response to Pltf's Motion for class certification due11/16/90; Status Conference scheduled for 12/12/90 at 4:45 P.M.. EOD 6/6/90, (Standish, J.), cm: all parties of record.
Oct 30	26	STATUS Conf held 10-26-90 before Standish, J. (rep; Jordan Lilienthal) (memo filed)
Oct 30	27	ORDER dated 10-29-90 that pltf shall file a motion to proceed pursuant to F.R.C.P. 23 by 11-26-90; Defts shall file a response to pltf's motion by 12-14-90; A Status Conf is scheduled for 12-18-90 at 4:00 p.m.. EOD: 10-30-90 cm: all parties of record.(STANDISH, J.)
Nov. 26	28	MOTION to proceed with class action and motion for summary judgment by pltf.

Dec 19	29	STATUS Conf held 12-18-90 CAV before Standish, J. (rep; Jordan Lilienthal) (memo filed)
June 26	30	TRANSCRIPT of proceeding held 10/3/89, 4/20/90. and 6/5/90 before Judge Standish. Court Reporter – Theodore W. Thomas.
July 17	31	MEMORANDUM and ORDER dated 7/17/91 that the Motion of Pltf. Darlene Perella, on behalf of herself and all others similarly situate, to proceed with this collective action to recover overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, as a class action pursuant to F.R.C.P. 23 is denied; that the above captioned civil cation is deemed an inidividual action by Pltf. Darlene Perella against Defts. Colonial Transit Inc., a/k/a Colonial Taxi Co. Inc. and Mayflower Contract Services, Inc.; that teh Motion of Pltf. Darlene Perell to amend her Complaint pursuant to F.R.C.P. 15(c) is denied without prejudice. EOD 7/18/91, (Standish, J.), cm: all parties of record.
Aug 6	32	NOTICE OF APPEALS FROM ORDER dated 7-17-91 by pltf. (Fees paid; TPO Issued.)
Aug 7	___	CERTIFIED Copy of Notice of Appeal & docket entries, copy of information sheet & ORDER dated 7-17-91 appealed from mailed to Ct of Appeals; copy of appeal & information sheet to Judge, Court Reporters and opposing counsel; copy of information sheet to appellant's counsel.

Aug 8	33	TRANSCRIPT Purchase Order filed by pltf/appellant indicating that transcripts are already on file with the D.C. Clerk's Office.
Aug 8	___	CASE CERTIFIED Complete for appeal purposes; 1 certified copy of the docket entries mailed to the USCA as the certified list in lieu of the record.
Aug 14	___	NOTICE that the appeal has been docketed as No. 91-3522.
Aug 14	___	RECEIPT Received from the USCA acknowledging receipt of One certified copy of the docket entries to be filed as the Certified List in Lieu of the Record.
Oct 21	34	CERTIFIED copy of order dated 10-18-91 received from USCA that the foregoing appeal is dismissed for lack of appellate jurisdiction.
Oct 22	35	NOTICE scheduling Status Conf for 11-5-91 at 4:45 p.m.
Oct 23	36	NOTICE rescheduling Status Conf from 11-5-91 to 11-7-91 at 4:45 p.m.
Nov 12	37	STATUS Conf held 11-7-91 before Standish, J. (rep: none); Status Conf scheduled for 12-11-91 at 4:45 p.m. (memo filed)
Nov 12	38	NOTICE scheduling Status Conf for 12-11-91 at 4:45 p.m.
Nov 12	39	NOTICE scheduling Non-Jury Trial for 2-18-92 at 9:30 a.m.

Dec 11	40	MOTION & ORDER dated 12-9-91 that the date for the Status Conf is hereby continued to 1-23-92 at 4:45 p.m.. EOD: 12-11-91 cm: all parties of record.(STANDISH, J.)
1992		
Jan 24	41	STIPULATION OF SETTLEMENT & ORDER date 1-23-92 that the Stipulation is Approved by the Court. By the entry of this Order, all matters and issues relating to this action are final, subject to the appeal of this court's order of 7-17-91, as set forth in the foregoing Stipulation of Settlement. EOD: 1-24-92 cm: all parties of record.(STANDISH, J.)
Jan 24	___	NOTICES mailed.
Feb 3	42	NOTICE OF APPEAL from ORDER dated 7-17-91 by pltf. (Fee paid; TPO issued)
Feb 4	___	CERTIFIED Copy of Notice of Appeal & docket entries, copy of information sheet, Order of 1-23-92 and Order of 7-17-91 appealed from mailed to the USCA; copy of appeal & information sheet to Judge Standish, Court Reporters and opposing counsel; copy of information sheet to appellant's counsel.
Feb 6	43	TRANSCRIPT Purchase Order filed by pltf/appellant indicating that transcripts are already on file with the D.C. Court Clerk's Office.

Feb 6	___	CASE Certified Complete for appeal purposes; 1 certified copy of the docket entries mailed to the USCA as the certified list in lieu of the record.
Feb 10	___	APPEAL of 2-3-92 docketed at NO. 92-3054.
Feb 18	___	RECEIPT for Certified List received from the USCA.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

DARLENE PERELLA, on her own behalf and all others similarly situated, Plaintiff, - versus - COLONIAL TRANSIT, INC., a/k/a COLONIAL TAXI COMPANY, INC., and MAYFLOWER CONTRACT SERVICES, INC., Defendant.	CA 89-669 October 23, 1989 April 20, 1990 June 5, 1990 U. S. Courthouse Pittsburgh, PA 15219

STATUS CONFERENCES
BEFORE
THE HONORABLE WILLIAM L. STANDISH

APPEARANCES:

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For Defendant: MARK S. SHIFFMAN, ESQ.
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Reported by:
Theodore W. Thomas
Official Reporter
1023B U. S. Courthouse
Pittsburgh, PA 15219

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* * *

PROCEEDINGS

October 23, 1989

THE COURT: In this case, the complain was filed in March, the 31st of March of this year, and it is a class action under the Fair Labor Standards Act.

The allegation is that 50 drivers drive these access vans that are used by the elderly and handicapped people, and that they were denied overtime wages.

The answer has been filed. It was filed in May, alleging an exemption from the provisions of the Act because the defendant operates taxicabs.

Then, on June 15, the motion for summary judgment has been filed, to which there has been no response.

I suppose, for the sake of economy here, we ought to move forward with the motion first, and I don't know what discover would be needed to develop the facts related to the motion, and then put it down for argument and take it from there.

I don't know that we need to get on with the class – even though one of the first things we ought to do is deal [p. 3] with class action demands. I don't know, if there is no cause of action here, we have no further to go with it. I suppose we ought to do that.

What do you need, Tim, because you are the plaintiff, and I suppose you would need some discovery as to the defendant's business.

MR. BARRY: Yes, Your Honor. I am familiar with the defendant's business, to some extent, but I would certainly need some discovery to develop a record. But, for the record, I believe there is – a status conference had been scheduled in this case previously. The only reason I bring that up is because, when the motion for summary judgment was filed for June, we received notice of the status conference very shortly thereafter, and I was under the impression – perhaps wrongfully so – that the Court wanted to discuss the matter at that point.

THE COURT: I probably did. I don't do the scheduling. My Deputy Clerk does the scheduling, but sometimes things come up that caues a conflict, and I cannot get to it.

MR. BARRY I did have a resonse prepared for the motion, but the one thing – I did think the Court perhaps wanted to deal with the class action aspect first.

THE COURT: Well, I can. What would be more efficient here?

[p. 4] MR. SHIFFMAN: It seems, if there is no action, it doesn't make sense to deal with the class action

issue. That is, the motions could be, certainly, dealt with independent of the class action issue.

THE COURT: And then, if we denied the motion for summary judgment, we would go forward with the class action. You probably need separate discovery on the class action, at least for your purposes of this case.

Would all the drivers be in the same position, vis-a-vis the plaintiff, as far as the claim is concerned, vis-a-vis the plaintiff and the defendant?

MR. SHIFFMAN: The company operates basically three kinds of transportation services, and drivers may perform and may function in any of those three different classifications or divisions. One is a traditional taxi; one is access, and one is school. We are not sure which drivers plaintiff believes should be included in the class.

THE COURT: Um-hum. well,you probably need some discovery about that, too, wouldn't you?

MR. BARRY: Yes, Your Honor. It is our position, in a nutshell, that there are approximately 200 to 225 drivers total, in that range; that approximately 130, 124 of those drivers are school drivers, and they regularly work – they bid on school.

THE COURT: Do they get paid overtime?

[p. 5] MR. BARRY: They do not get paid overtime for working access work. That is the extent of the allegation with respect to them.

THE COURT: Um-hum. They do access work, too?

MR. BARRY: They were assigned, during the period of time they were assigned access work, extra work in addition to their regular school runs, they were assigned access work, and they were not paid overtime for the hours over 40 hours per week.

Then there is access drivers. The access drivers, which is the primary thrust of the complaint –

THE COURT: How many access drivers are there?

MR. BARRY: I estimate somewhere between – on a regular basis – 70 to 85, in that range.

The access drivers regularly, during this period of time, worked in excess of 40 hours per week, probably averaging somewhere around 55 or 60 hours per week. That would be my guess. Obviously, you need to develop that in discovery.

THE COURT: Um-hum.

MR. BARRY: Then, as Mr. Shiffman has indicated, there is a separate division called taxi.

THE COURT: How many of those?

MR. BARRY: I would say the range on that, during the relevant period of time, was from five drivers to 25 [p. 6] drivers.

At one point – and I already have some discovery prepared on this point; Mr. Shiffman and I were both involved, and so we were somewhat familiar with the

facts ourselves. At one point, in August of '88, almost a year ago, the company almost completely discontinued the taxi operation – almost. They ultimately did not, but, at that particular point, they were at five taxi drivers, or maybe four. There were a very small amount of taxi drivers. So, with respect to the position on taxi drivers, it is our position that is a relatively small part of the company's total driving force, and that it is access drivers that we are claiming overtime for, not taxi drivers. They did not do taxi work during the week in question. They worked on the access contract. It is a situation where, in order for all the drivers to be kept from overtime, because a few of the drivers worked a taxicab, it would seem to me that any company would start a taxicab division and all the employees in the entire company would be exempt from overtime, but that is the one issue. I have some discovery already prepared on that, but I was waiting to see how the Court wanted to proceed on this.

THE COURT: Well, I think we ought to proceed with discovery, at least as to summary judgment, and I don't see why, at that time, you can't do discovery on the class action [p. 7] aspect, too, or anything else that would be relevant to this case, with the idea of finishing up the discovery, at least as far as the motion is concerned, within 60-some days or something like that. I don't want it to go on forever into the future.

MR. BARRY: I understand.

THE COURT: And then we will schedule an argument. I will get a response, of course, and then briefs, and schedule an argument; and then, depending on what happens, I would schedule a hearing on the class

action next. That would be the next thing in line to do, and it depends on how far along it was at that point before I could schedule it.

MR. SHIFFMAN: What is your position on the summary judgment?

MR. BARRY: I have a request for admissions. I could give it to you now – no, I won't, because I don't think it is appropriate because of certain discovery, but the basis for admissions was to give approximate ranges of the number of drivers, which I just gave, or more definite information if you have it; but we are looking at a three-year period of time, and I think we can deal with approximate numbers.

THE COURT: Well, the class action, we will need more information. We have to know who is in the class, and we have to know why you think they should be.

MR. BARRY: I am not sure to what extent the [p. 8] appropriateness of this class action can be denied, because they are similarly situated. I think the only reason it could be – possibly the only basis for saying the class members are different from each other would simply be on the issue of damages, which I don't think is an issue.

THE COURT: No, probably not; but you have the question of adequate representation and all of this.

MR. BARRY: The other issue that needs to be addressed for the purpose of motion for summary judgment, as I understand their position, they are saying they are exempt because they are an interstate carrier.

MR. SHIFFMAN: We have not made a motion on that basis. There is an affirmative defense for that, but the motion for summary judgment deals just with the taxi.

THE COURT: Well, is it your position, even if the taxi operation is only a small part of the total business and even though a lot of the drivers never drive a taxi, they are still exempt?

MR. SHIFFMAN: That is correct, You Honor.

MR. BARRY: Well, I think we ought to – the other think I have already prepared, Your Honor – again, I did not file it because I was thinking you would want to have the status conference – I think a cross motion on that issue would be appropriate.

THE COURT: All right.

[p. 9] MR. BARRY: If we are going to deal with that issue, let's get it resolved, because it is pretty definitely a question of law, I don't dispute that, and I think that is the most expeditious way of handling it. I will get if filed right away, since it is already prepared; and I would like to ask the Court to give us until sometime early in the year to complete the discovery, at least.

THE COURT: On the summary judgment, okay.

MR. BARRY: Yes.

THE COURT: That is okay.

MR. BARRY: I just know I have a lot of things going on the next month with hearings and stuff, and I would like to be able to address this in December.

THE COURT: Suppose we finish off the discovery on the 31st of January, on the summary judgment issue, and then any response to the summary judgment or cross motion by February 21, and a resonse to the cross motion, if any, by the 14th of March, and we will set it down for argument either in March or April. Then we will take it from there, depending on what happens. If it turns out that it goes forward, then I will – in the meantime, you can continue your discovery, as far as the class action aspects of it, and I will probably cut you off on that discovery, if we go forward at that point, sometime in May, so we can get the hearing on the class actions, at least, in early summer or [p. 10] late spring.

MR. BARRY: Okay.

THE COURT: Okay. You will get something in the mail from me. You will get an order on this. Then we will take it from there.

Is there anything else we need to talk about today?

MR. BARRY: I don't think so.

MR. SHIFFMAN: No.

THE COURT: Okay. Thanks a lot.

(Proceedings in the entitled matter were adjourned at 4:47 p.m. o'clock.)

[p. 10] PROCEEDINGS

April 20, 1990

THE COURT: Good morning.

This is a motion for summary judgment in this case in which the plaintiff alleges that, in violation of the Fair Labor Standards Act, that she was not paid overtime. The defendant has asserted that she was not entitled to overtime because the defendant, Colonial, was engaged in the business of operating taxicabs, although it seems admitted by everybody that the plaintiff herself was not a taxicab driver. She drove vehicles which were used under – which were hired under contract to transport people with disabilities from various places on prescheduled trips, as I understand it.

It is a fairly narrow point. The question is whether the defendant, Colonial, and the plaintiff fall within the exception to Section 213(b)(17) of the Act at 29 USC, Section 213, which says: "The provisions of Section 207 of this title shall not apply with respect to any driver employed by an employer engaged in the business of operating taxicabs."

It seems pretty much undisputed that, at least only a relatively small portion of the business of Colonial was taxicab business, although I don't think it is disputed that, in fact, they did operate some taxicabs.

[p. 11] MR. SHIFFMAN: Yes.

THE COURT: Okay. I will hear what you have to say. I have gone over the briefs, and I am fairly familiar with it.

MR. SHIFFMAN: Your Honor, I am Mark Shiffman, representing the defendant, Colonial Transit and Mayflower Contract Services.

As you said, our motion for summary judgment is based exclusively on the language of 213(b)(17). We believe that provision excludes from the obligation to pay overtime any driver employed by an employer engaged in the business of operating taxicabs.

In order to establish grounds for summary judgment, we must establish two things: one, that plaintiff and other putative class members were, in fact, drivers; and, two, that defendant is engaged in the operations of taxicabs.

Point one, as you have indicated, there is no dispute. Plaintiff was, in fact, as is, in fact, a driver.

Point two, there is a partial dispute; however, we don't believe that that partial dispute is relevant to the summary judgment inquiry. While plaintiff acknowledges that defendant does have taxi operation, it is asserting that she is not a taxi driver and is, in fact, an access driver.

As you have stated, her primary function is to transport elderly and handicapped persons. The program is [p. 12] primarily funded by the Pennsylvania Lottery and administered by the Port Authority of Allegheny County. That transportation service does involve door-to-door service. It is normally scheduled a day in advance, and it can provide for anyone, I believe, over age 60 or 62, or handicapped persons, any kind of transportation service – if they want to go shopping, if they want to go to the supermarket, if they want to go to their doctor, they call a day in advance and schedule a pickup time and their destination, if possible, their schedule, a period of time when they can be picked up at their destination and

returned home. If that is not possible, when they conclude their function, they call Colonial and, hopefully, there is a vehicle to pick them up. They pay for the service with scrip, play money, that they purchase for about ten cents on the dollar from the program.

We didn't raise the question whether access drivers are taxi drivers within the meaning of the Act. We didn't raise that for two reasons: one, we don't believe it is necessary. We believe that the exemption and the analysis of the exemption in the Michigan case precludes that analysis. The second reason is that we understand that the issue of whether plaintiff is, in fact, an access driver or taxi driver does raise significant factual questions which would require additional discovery and which could confuse the issue.

[p. 13] We move for summary judgment on what we believe to be the simplest ground. In Michigan, a case cited in my brief, the Court was called upon to determine whether or not bus drivers, who were employed by an employer engaged in the operation of common carrier by rail, were exempted under the Act. The exemption relied upon there was B-2 and dealt specifically with employes engaged in the operation of transportation by rail. In concluded that those drivers, bus drivers, were, in fact, exempt from that case, the Court noted its obligation to consider two premises, both of which are asserted by plaintiff in this case, those being that there is obligation to liberally interpret remedial legislation such as the Fair Labor Standards Act, which requires one who asserts an exemption to show they are fairly applicable to that exemption.

After considering those premises, the Court concluded that bus drivers were still exempt. In reaching that conclusion, it noted that Section B of 213 is a separate exemption. The Court noted some of them were raised with reference to employees and other were raised with reference to the employer and the function of the employer. The Court concluded that B-2 in that case was raised with reference to the employer, and therefore included bus drivers, even though they were not employed in a rail function at all.

We know that the facts in our case are clearly [p. 14] analogous. The exemption that we are asserting is drivers employed by an employer in the business of operating taxicabs. The plaintiffs are drivers. The defendant is engaged in the taxicab business. We believe that the instant case is even more controlled and easier controlled by the Michigan logic than the facts were in the Michigan case.

Our access drivers – plaintiff and putative class members – operate sedans and vans at least similar to traditional taxicab vehicles. In Michigan, the employees in question were operating buses, which are certainly different than operating railroad cars.

Plaintiff's response didn't address Michigan at all. Instead, they cited Werts and Airline Transit and attempted to distinguish the function of an access driver from a taxi driver. Plaintiff also cited the Donovan, Brennan, and Rowe case, which requires the Court to consider the premise that the remedial legislation should be liberally construed and exemptions must be narrowly construed. As I mentioned, the Michigan Court noted that

and rejected it and relied upon what it believed to be the clear language of the statute.

We believe that summary judgment in this matter can be decided on the face of the statute, and it is not necessary to consider the distinction, the factual distinction between taxicab operations and access operations.

THE COURT: Well, Michigan says that it didn't fall [p. 15] within the scope of the taxicab exemption.

MR. SHIFFMAN: Michigan didn't involve taxicabs.

THE COURT: It involved bus drivers, airline transportation –

MR. SHIFFMAN: No, Michigan was –

THE COURT: Is this the wrong case?

You are right. I am looking at the airline transportation case.

MR. SHIFFMAN: Michigan v. Baltimore and Annapolis Railroad.

THE COURT: Right.

MR. SHIFFMAN: In that case, the employer attempted to assert the exemption for bus drivers, even though the language of the exemption dealt with employers engaged in the rail industry; and the Court granted the employers exemption and concluded that the bus drivers should be exempted because the employer of those bus drives was engaged in the rail industry, just as we are asserting that we are engaged in the taxicab business and these are drivers of ours.

Unfortunately, there were no cases in the taxi exemption analogous to this situation.

THE COURT: Okay.

MR. SHIFFMAN: Thank you.

THE COURT: Mr. Barry.

MR. BARRY: Thank you, Your Honor.

[p. 16] There is no question that the defendant does operate a taxi business. That is not in dispute. There is a question, certainly, to what extent it operates a taxi business, but the defendant's argument for summary judgment is pure and simple, because the defendant operates a taxicab business, that no matter what other operations the defendant also has, that all of its employees, all of its drivers, are exempt from the Fair Labor Standards Act, simply because it does have a limited taxicab operation. And, as I have indicated in my brief, I think it is clearly not the intention of Congress, nor would it be the decisional holdings under the Fair Labor Standards Act, to support such a broad, over-reaching result.

The Michigan case, which was decided way back in 1960, I don't think is appropriate in its analysis concerning the taxicab exemption. It does not specifically deal with that exemption.

The two cases that I have cited in my brief, the Werts case and the Airline Transit case, do specifically address this issue, and it specifically shows how the Court, in interpreting the intent of Congress, has reviewed and analyzed the functional distinction between a traditional taxicab driver and an access or a driver that would be similar to the access drivers in this particular case, the

distinction being that the traditional taxicab driver is paid [p. 18] Perella and her class, because those people are not out there as carriers available for hire in the public. This is a different type of situation, with the access federally funded.

THE COURT: That was part of the analysis in Michigan, that the ICC had jurisdiction of this whole operation.

MR. BARRY: That's right, and that is not the case here, and it is not under the regulations of the PUC, either.

THE COURT: Um-hum.

MR. BARRY: I will note for the record simply that the defendants have responded to initial interrogatories and a response for production of documents. There were certain objections that the defendant made to the interrogatories and the response, which have not been addressed by this Court.

Mr. Shiffman and I had a stipulation between ourselves that we would proceed with this motion, because I thought we had enough information for the Court to address this motion without prejudice to my seeking further responses in the future on those issues. I did make a copy of the answers to interrogatories, if the Court would like.

THE COURT: Is there any part that is relevant to my decision here?

MR. BARRY: I would say the only thing that, at this point, that I would want to call to your attention – I would [p. 19] say two things. One would be that the

defendant is operating the taxicab part of its business under a different fictitious name, which I think is a factor, but I don't think it is a dispositive factor, because I really feel that the Court has to analyze and look at the actual duties and distinguish between the drivers. The name is just the name, but the other part, which I think is important – and Mr. Shiffman has given me a letter on this point, also – is that, as far as the taxi business itself is concerned, at one point, in August and September of 1988, the defendant almost completely discontinued that part of its business, and that is part of the period of time that we are looking at. I think that is material from the point of view that, although they do operate a taxicab business, it is limited, and, at one point, it almost was discontinued. That emphasizes the fact that the Court should look at the actual duties of the drivers in question, rather than saying that all drivers are exempt simply because five out of 220 are operating a taxicab.

THE COURT: How many? What is the percentage, do we know?

MR. BARRY: Well, at one point – and Mr. Shiffman did clarify this at one point – in August of 1988, the low number would have been five.

THE COURT: Five taxicab drivers?

MR. BARRY: As of August or September of '88.

[p. 20] THE COURT: As opposed to what?

MR. BARRY: On the average of, I would say, 200 to 220.

MR. SHIFFMAN: Approximately.

THE COURT: Two hundred twenty access drivers?

MR. BARRY: No; that would be access and school drivers. The school drivers are also part of the class, to the extent that they worked access, only to that extent, because, other than that, they were paid the overtime.

THE COURT: Oh, they were?

MR. BARRY: Yes.

THE COURT: Why wouldn't they be exempt, if these access drivers were exempt?

MR. BARRY: I don't know.

THE COURT: Okay. Anything further?

MR. BARRY: I rely on my brief, Your Honor. I think that the brief lays out the issues, in the affidavit, I tried to lay out the factual distinctions.

I will also note that I did cite Section 207-N of the Act in my brief for support for the proposition that Congress does not intend to exempt all drivers. There is a – 207-N is a provision that addresses people who operate intercity vehicles, which is what we really have here, vehicles within an urban area, and they are covered by the Act. There is only exemption for part of their charter work. [p. 21] That shows congressional intent that these type of employees would be covered by the Act and that the reasons for exempting the traditional taxicab drivers are not present here.

THE COURT: Okay.

MR. SHIFFMAN: If I may respond very briefly to a couple of points made by Mr. Barry.

THE COURT: Sure.

MR. SHIFFMAN: Mr. Barry indicated that the name of the employer – that he operates under separate fictitious names. I am not sure that is accurate. Over the years, the employer has had an additional name. I believe it originally was Colonial Taxicab Company, and it became, in addition to Colonial Taxi, Colonial Transit, and also Metro Taxi. And then, in November of'88, all of those entities were purchased by Mayflower Contract Service, and Mayflower Service continues to operate under the various names. I don't believe it is accurate that some are operated under some names and some under others. It really is not a clear situation.

THE COURT: Okay.

MR. SHIFFMAN: In response to Mr. Barry's comment about the reduction of taxi operations in August and September of 1988, at that time the reason for that reduction was due to increased liability insurance for the taxi [p. 22] vehicles. Colonial, at that time, was having serious problems obtaining insurance, not because of its own personnel but because of the taxi rate generally, and it would have been required to pay taxi rates on all of its vehicles or all of its sedan type operations. It considered reducing those operations to conclude that problem. That is one of the reasons why the operations were sold completely to Mayflower. Mayflower is self-insured and didn't have that liability insurance problem, and after Mayflower took over operations in November of '88, the

number of taxis on the road and the number of taxi drivers increased to a number ranging between 20 and 40.

THE COURT: I see. All right.

Well, I have had an opportunity to think about this, and, rather than delay everything, I am going to decide it here from the bench.

I believe the motion should be denied, and we should go forward.

I believe, in the first place, that, notwithstanding that the language of Section 213(b)(17) says that any driver employed by an employer engaged in the business of operating taxicabs, it does not necessarily mean – or does not mean that if an employer has multiple types of employees doing different kinds of work, the fact that they happen to operate a limited number of taxicabs exempts drivers driving other [p. 23] kinds of vehicles from the provisions of the Act.

I note here, for instance, that, in the Legislative History – and that goes back to referring to the U.S. Code – Congressional and Administrative News, Volume II, page 3016 – that in discussing the taxicab companies, as the Legislative History says, that Section 13-A and 12, Subsection 13-A – Subsection A-12 of the Act is repealed to provide minimum wage protection to a hundred thousand employees of taxicab companies, and goes on to say, "However, tipped employees of taxicab companies will be treated identically to such employees in restaurants," and insert access for the above in Subsection 3.

Well, it is apparent, I think, there, that what the Act is driving at is to make exempt people who have other

sources of income, other than their wages, and I don't think it is intended here that these people that drive these access vehicles are getting tips. They are getting paid an hourly rate. Furthermore, unlike a taxi driver, their routes are planned in advance. It may not be the same routes, but you have to make reservations ahead of time. It is apparent they just don't operate on their own, as far as selecting who they are going to take and where they are going to go, the way a taxi driver does. So I think, in terms of types of employment, there is a distinction between what is done by a taxicab driver and what these access drivers do.

[p. 24] Now, I will agree with you, with the defendant, that most of the subsections of Section 213 talk about – specifically about what the employee does, as opposed to what the employer's business is, and that is true. But where you have multiple employment within the same business, I think that that Section 17 has to be read as any driver employed in an employment engaged in the business of operating taxicabs. That is what I think it means, and I am holding that.

I am sure that the Circuit will have a chance to look at it later, but anyway, that is what I find here, now.

Where does that leave us in this case?

There still is a motion for class certification. I haven't gotten to that. Would this make it appropriate – would that be the next item, or what?

MR. BARRY: I believe so, Your Honor. I believe that would be the next step, now that we have proceeded thus far, that we should proceed with addressing the class

action issues, and also the notice issue would be appropriate.

THE COURT: Why don't you – have you filed your motion for class certification yet?

MR. BARRY: Your Honor, at the last status conference, the Court said you wanted to address this motion, and then we would proced with –

THE COURT: You go ahead and do that, and when we get that all together – first, we will probably have a [p. 25] conference to decide what we will do procedurally, and then I will hear whatever has to be done. Maybe you can work this out.

MR. BARRY: With respect to the definition of the class?

THE COURT: Well, that, and maybe when that is done, maybe you can work out a settlement. I don't know if you can settle this case or not.

MR. BARRY: I will be glad to discuss it, Your Honor.

THE COURT: Okay. I will enter an order denying the motion for summary judgment, for the reasons stated on the record, so if you need a record, you will have to get a transcript.

(Proceedings in the entitled matter were adjourned at 12:05 p.m. o'clock.)

[p. 26] (Proceedings in the entitled matter were convened. Mr. Barry was present in person; Mr. Shiffman participated via telephone conference call.)

THE COURT: Hello. This is Judge Standish.

MR. SHIFFMAN: Hi Judge Standish. This is Mark Shiffman.

THE COURT: Right. We have Tim Barry here with us, too, and I convened this status conference just to get some scheduling squared away, so we can get on with the class certification motion, which seems to be the next thing we have to take up here.

MR. SHIFFMAN: Yes, sir. First of all, let me thank you for permitting me to participate in this by a conference call.

THE COURT: Well, that is fine. I understand you are out of town, and it is convenient for me to do it and get on with it this way, and I don't mind doing it all, so long as nobody else does.

MR. SHIFFMAN: Thank you again.

THE COURT: I think the first thing we have to decide is when we are going to have the discovery completed.

How much discovery do you need to do on this issue, and when can it be done?

MR. BARRY: Your Honor, I already served interrogatories upon the defendant, through Mr. Shiffman, by [p. 27] date of May 9, 1990, and Mr. Shiffman has already talked to me about it. He is going to need some additional time, which I agreed to, because what I am requesting is going to take some time to put together.

THE COURT: It is probably pretty voluminous, and one of the issues we have to know how many people are involved here in the same category.

MR. SHIFFMAN: Right.

THE COURT: Could you get it done by the end of September?

MR. SHIFFMAN: Get the discovery done by the end of September?

THE COURT: Yes.

MR. SHIFFMAN: I think we certainly can, Your Honor. I spoke with Mr. Barry last week about the additional time, and we said that we would discuss it with you. Since that time, another question has arisen, but let me explain my position, and this relates to the whole motion for class certification as well.

THE COURT: Yes?

MR. SHIFFMAN: The discovery request is basically to identify the names of all the persons who were potentially in the class.

THE COURT: All right.

MR. SHIFFMAN: And also to calculate the number of [p. 28] hours they worked during various pay periods throughout a two- or three-year period. I believe that that would be an appropriate – while it is certainly a burdensome request. I believe it would be appropriate, if this were appropriately a Rule 23 class action, and I don't believe it is appropriately a Rule 23 class action.

I believe that there are similar essentially class action provisions under the Fair Labor Standards Act, and that this should be pursued under Section 216-B of the Fair Labor Standards Act. Under that section, it is just the opposite of a Rule 23 class action. Rule 23, you notify everyone, and anybody who doesn't choose to participate must opt out. Under the FLSA, everyone who does choose to participate must opt in. It is just the opposite.

THE COURT: You still have to identify the members of the class.

MR. SHIFFMAN: I agree, I do have to identify the members of the class; and what I would propose to do is identify the members of the class within the next week or two, names and addresses, and then permit Mr. Barry to attempt to contact – to contact them and to get their intent to opt in. Then, when we know who is opting in, I will go through and get all the information for those who have opted in. That will, hopefully, significantly reduce it.

THE COURT: It seems to me it makes a difference, [p. 29] having the information, whether they opt in.

MR. SHIFFMAN: That's right. So there may be 250 people. If all 250 opt in, I have to do it anyway. If they don't, I will not have to gather this.

THE COURT: How will they know whether they want to opt in, until they know whether they are owed something? I think you should give him all the information now, and then we will deal with this question of which kind of class it is later. It will be relevant to

the opt-ins, the information about wages would be relevant to whether they would opt in or not, if that is the kind of class it is going to be.

MR. SHIFFMAN: That is true, except I would think that these people would know whether or not they worked in the overtime. They may not know how much they worked.

THE COURT: They might not. So we have to get this information, anyway. I think it would be much less confusing, in the long run, to get all the information together, and then we will deal with these questions later.

MR. SHIFFMAN: That will just take some additional time.

THE COURT: I will give you until the end of September. It seems to me that, by the end of September –

MR. SHIFFMAN: That will be more than sufficient time.

THE COURT: So we will make it September 28.

[p. 30] MR. SHIFFMAN: And at that point, we will then address which is the appropriate –

THE COURT: No. Then I will ask plaintiffs to file a brief in support of the motion for class certification.

MR. SHIFFMAN: Okay.

THE COURT: And we will have a brief, plaintiff's brief – I would think you could do that in three weeks after the time – by the 19th of October, and then defendant would file a responding brief by November 16.

MR. SHIFFMAN: Okay.

MR. BARRY: Judge, in the brief – I am sorry – do you want us to address which class –

THE COURT: What kind of a class it is, any information, whatever. Then I will have a status conference either in November or early December, and we will talk about what we are going to do next then. we will decide what we need in the way of a hearing on this issue, whatever. But I think the briefs – the plaintiff's and the defendant's briefs ought to be filed together with supporting documentation. That is, if you are going to file affidavits or whatever, they ought to be filed when you file your brief.

It will be in my order that you get. Then we will have a status conference. At the status, we will discuss how lengthy a hearing, what kind of a hearing, and all that, and then I will set it down for hearing or whatever is [p. 31] appropriate, probably in January or sometime like that.

How's that?

MR. SHIFFMAN: That's fine with me, Your Honor.

THE COURT: Okay. Well, is there anything more we need to take up today? We will get an order out to you by tomorrow.

MR. BARRY: The only other thing I would want to raise, Your Honor, is, first of all, to clarify that the hearing in January of this year –

THE COURT: On the class action certification.

MR. BARRY: They would have to give notice to all the potential class members of that.

THE COURT: No, not necessarily, unless – now, that is whether the class action goes forward and whether it ought to be certified. Then, after it is certified, depending on what kind of a class it is, you give notice. That order will have in it a notice of provisions and everything else, but that will be after the briefing and argument.

MR. BARRY: The only reason I am raising it, Judge, is the issue that Mr. Shiffman raised here about the Section 216-B classification – I thought that only applied to the Department of Labor.

THE COURT: Well, I don't know, but that is not something we need to deal with today.

MR. BARRY: My point is this: it is my [p. 32] understanding of the Rule 23 procedure – and we don't know which one we are going to go under, we are deferring that decision. My understanding of that procedure is that class members should be given some sort of notice of the hearing concerning class certification.

THE COURT: That is not what we have done historically. We have had hearings on whether to certify the class, and then, if we certify the class, we tell the attorneys what they have to do by way of giving notice and how they are to do it and all that.

MR. BARRY: That's fine, Judge.

THE COURT: And that sets it on the track.

MR. BARRY: Very good. I was just looking through some forms, in terms of how it is done.

THE COURT: Maybe it is done, but that is not what we have done. In fact, we just did it the other day, and we did it this way, and nobody objected to it, and we put in the order we entered to certify the class what kind of notice and how it was to be given and all that, and then we will have something again, later down the line, and then everybody will be notified, and we have the opt-out – whether it is opt-in or opt-out. And we will hear, too, if it is certified as a class, and whether it is a 216-B or a Rule 23 class.

MR. BARRY: Fine. The only other issue I would address – and like Mr. Shiffman, too, addresses that – [p. 33] perhaps he could respond to my interrogatories at some time prior to September 30.

THE COURT: Oh, yes.

MR. BARRY: So I could, if necessary, follow up on that discovery.

THE COURT: No. The ordinary rule is you have 30 days to answer interrogatories. Now, if there are extraordinarily difficult questions to answer, because of the volume or complexity, you can have more time than that; but, beyond 30 days, the burden would then shift to the resonding party to show cause why he can't do it on time.

MR. BARRY: What I am saying, Judge, to perhaps be specific – and maybe Mr. Shiffman can resond to this – if he could respond to my request to interrogtories I have already served by July 31, then –

MR. SHIFFMAN: That should be no problem.

MR. BARRY: That's fine, then.

THE COURT: That gives you time to go forward.

MR. BARRY: And follow up, if I need to, and discovery will be completed by September 30.

THE COURT: That's good.

If anybody wants one, they can order a transcript of this proceeding here today, but we will have a written order for you out tomorrow.

MR. BARRY: That's fine, Judge. I don't need a [p. 34] transcript. Thank you.

(Proceedings in the entitled matter were adjourned at 4:20 p.m. o'clock.)

* * *

REPORTER'S CERTIFICATE

I, Theodore W. Thomas, do hereby certify the foregoing to be a true and correct transcript of proceedings in the entitled matter at the time and place noted in the heading hereof.

/s/ Theodore W. Thomas
Theodore W. Thomas
Official Reporter
1023-B U. S. Courthouse
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